

MOHD. GHANI MD. ISMAIL

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v.

SYKT. PERNIAGAAN CUEPACS BHD.

HIGH COURT MALAYA, KUALA LUMPUR

SITI NORMA YAAKOB J

[CIVIL SUIT NO. F 132 of 1981]

b

24 MAY 1985

CONTRACT: *Sale and purchase agreement of house - Revision of fee after payment of booking fee - Another revision made before signing of formal sale and purchase agreement - Formal sale and purchase agreement not executed - Developer returned all payments made - Whether letter of allotment constituted sale and purchase agreement - Whether specific performance can be ordered.*

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The defendant was a housing developer. The plaintiff was allotted a vacant lot at the price of RM139,000 which also included the cost of the double-storey bungalow to be built on it. A letter of allotment dated 11 July 1979 was sent to the plaintiff specifying the schedule of payments towards the purchase price as well as the excess-over-standard-area charge rate. Following that schedule, the plaintiff paid the booking fee of RM2,650 which was acknowledged by the defendant as made for the purchase of the lot in question. The plaintiff also submitted a form to purchase.

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In a letter dated 15 December 1979, the defendant unilaterally revised the schedule of payment of the 35% of the purchase price to be made directly by the plaintiff to it. The booking fee was increased to RM11,300 and reluctantly the plaintiff paid the difference between the old booking fee (RM2,650) and the new booking fee (RM11,300). No variation was made in relation to the price of the lot and the house which still remained at RM139,000. On the 29 April 1980, the defendant wrote to the plaintiff requiring him to pay for the additional land at RM5 per square foot. The plaintiff complied with this request.

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In the next stage of signing the sale and purchase agreement, the plaintiff was informed of yet another unilateral variation by the defendant. The price of the land and the house was increased to RM169,500 and the excess-over-standard-area was increased from RM5 to RM7 per square foot. The plaintiff refused to sign the sale and purchase agreement. On a further refusal to sign the agreement, the defendant refunded the sum of RM17,435 to the plaintiff being the total sum paid by the plaintiff. The allotment was withdrawn from him.

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The plaintiff alleged that there was a concluded agreement reached between him and the defendant and by unilaterally increasing the price of the house and land, the defendant had breached such agreement. Specific performance was prayed for.

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On the other hand, the defendant contended that there had been misrepresentation on the part of the plaintiff as being a non-Bumiputra he was not entitled to the housing lot, and that as the plaintiff had refused to execute the sale and purchase agreement it had every right to treat the offer as being cancelled.

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Held:

[1] There was no merit in the defendant's claim that the plaintiff had misrepresented himself by passing off as a Bumiputra as it is clear that he is a Bumiputra.

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a [2] The defendant had made an offer to the plaintiff *vide* its letter of allotment of 11 July 1979. This was varied by the first variation introduced unilaterally by the defendant *vide* its letter of 15 December 1979. The plaintiff had agreed by paying the booking fee on 16 January 1980. Hence there was a valid contract between them pursuant to the terms and conditions contained in the letter dated 15 December 1979. The defendant by purporting to vary the terms of the agreement for the second time, the variation of which is contested by the plaintiff, had breached that contract.

b [3] The defendant had been at fault and since the contract is capable of being specifically performed, specific performance is the right and proper remedy. The sale and purchase agreement was to be executed by both parties based on the original agreed price within one month of the judgment and the booking and excess fees of RM13,950 was to be paid on the signing of the agreement. The balance of the 35% of the purchase price was to be paid by the plaintiff within two months of the signing of the sale and purchase agreement. The plaintiff was not to bear interests for late payments.

[Judgment for plaintiff. Defendant to pay costs of the action.]

For the plaintiff - A.J. Dason; M/s. Dason & Co.

For the defendant - Stephen Goh; M/s. Stephen Goh & Partners

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JUDGMENT

Siti Norma Yaakob J:

e In 1979, the defendant was the developer of a housing estate known as Fern Groove Housing Scheme at 6½ miles, Cheras, Kuala Lumpur. The plaintiff was one of the many purchasers, who had applied to secure a vacant lot on which a double-storey bungalow was to be constructed. Sometime in July that year, the plaintiff received the defendant's letter of allotment dated 11 July 1979, AB2, offering him a vacant lot at the price of RM139,000 which also included the cost of the double-storey bungalow to be built on it. AB2 also specified how payments towards the purchase price were to be settled, 35% amounting to RM48,650 to be paid directly by the plaintiff and the balance of 65% to be settled by a loan, to be arranged by the defendant.

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The 35% purchase price was to be settled in the following manner.

g	(1) Booking Fee		RM 2,650
	(2) On signing Agreement		RM 5,000
	(3) First Month's Instalment		RM 5,000
	(4) For the 2nd month and 24th months thereafter at a monthly instalment of	RM1,500	RM36,000
	Total		<u>RM48,000</u>

h As the area of a standard vacant lot was only 5,800 sq. feet, the defendant also charged any land in excess at the rate of RM5 per square foot.

Following the receipt of AB2, the plaintiff paid the booking fee of RM2,650 and this is evidenced by the defendant's receipt, AB6, dated 31 July 1979, which confirms that the amount was for the purchase of Lot No. 31. At the time of paying this booking fee, the plaintiff also submitted a form to purchase similar to AB3.

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Sometime in December, 1979, the plaintiff received the defendant's letter dated 15 December 1979, AB9, advising him that the schedule of payment of the 35% to be made directly by him as stated in AB2 had to be revised in view of the price increase and other relevant factors. He was asked to settle the amount in the following manner:

(1) On booking, 10%	RM13,950	
(2) On signing of Agreement	13,950	
(3) On completion of foundation, etc.	3,500	
(4) On completion of framework, etc.	3,500	
(5) On completion of Brickwork, etc.	3,500	
(6) On completion of roofing, etc.	3,500	
(7) On completion of electrical works, etc.	3,500	
(8) On completion of roads, etc.	3,425	
Total	RM48,825	

The defendant also demanded that the plaintiff deposit a further sum of RM11,300 as booking fee, being the difference of the 10% booking fee in the revised rate in AB9 and the RM2,650 already paid by the plaintiff pursuant to AB2, within 14 days of the date of the letter and the Sale and Purchase Agreement would be executed within 1 month of the plaintiff settling the balance of the booking fee. AB9 however made no variation to the price of the house and the land which still remained at RM139,000.

In reply to AB9, the plaintiff wrote AB13 dated 26 December 1979, expressing his concern over the manner in which the defendant had unilaterally decided to revise the schedule of payment which he considered to be prohibitive to Bumiputras like himself, and in view of this, he indicated that he would stick to the schedule of payment as stated in AB2.

To this, the defendant responded by its letter dated 8 January 1980, AB16, explaining the reasons why the schedule of payment had to be varied and advising the plaintiff that should he refuse to comply with the varied schedule of payment as stated in AB9, it would refund the booking fee made by him and would treat the allocation of Lot No. 31 to him as cancelled. On 16 January 1980, the plaintiff sent the balance of the booking fee amounting to RM11,300 in 2 cheques to the defendant and this is evidenced by his letter, AB19 and the defendant's receipts, AB20 and 21.

As Lot No. 31 was in excess of the standard lot by 697 square feet, the defendant wrote again to the plaintiff on 29 April 1980, AB23, requiring him to pay for the additional land at RM5 per square foot, amounting to RM3,485. The plaintiff complied and the defendant acknowledged receipt of this payment by AB28.

Having paid the full extent of the booking fee which represented 10% of the purchase price pursuant to AB9, the next step in the buying process was the signing of the Sale and Purchase Agreement, and by letter dated 28 August 1980, AB32, the defendant's solicitors informed the plaintiff to call at their office to execute the Sale and Purchase Agreement. The plaintiff obliged but on being informed by a Chinese gentleman at the office of the defendant's solicitors that the price of the land and house had been increased from RM139,000 to RM169,500, and that the price of the extra land was also increased from RM5 per square

a foot to RM7 per square foot, he refused to sign the Agreement as it contained terms contrary to what was agreed between them and to date, he has not executed any Sale and Purchase Agreement with the defendant.

b On 9 January 1981, the defendant wrote again at AB36 advising him of the variation of the purchase price and the mode of settling the 35% of the purchase price and requiring the plaintiff to call at its solicitor's office to execute the Sale and Purchase Agreement within 14 days of the date of the letter, failing which, it would return the booking fee made by him and reallocate Lot No. 31 to the next person on the waiting list. The plaintiff did not comply with the instructions in the letter and subsequently, by a letter dated 11 February 1981, AB46, the defendant refunded the sum of RM17,435 by Bank Beruh cheque no. 060025 being the total sum paid by the plaintiff as at that stage and the letter also confirmed that as he had failed to execute the Sale and Purchase Agreement, the allotment of Lot 31 had been withdrawn from him. The plaintiff, however, did not cash the cheque but instead handed it to his solicitors and to date the cheque remained uncashed.

c In this suit, the plaintiff alleges that there was a concluded agreement reached between them and the defendant had, by unilaterally, increasing the price of the house and land, breached such agreement and he prays for a declaration that there exists a Sale and Purchase Agreement between them, specific performance of that agreement or damages in lieu and costs. He drops the other prayers claimed in his statement of claim.

The defendant raised the following defences;

- d* (1) there had been misrepresentation on the part of the plaintiff, as being a non-bumiputra he was not entitled to the housing lot.
- e* (2) as the plaintiff had refused to execute the Sale and Purchase Agreement, it has every right to treat the offer as being cancelled.

f As the plaintiff's evidence was in no way disputed, I shall now deal directly with the defendant's defence. The defendant's only witness testified that 25% of the housing lots was earmarked for Bumiputras and that the only people qualified to take up the offers for the 30 houses that make up 25% of Bumiputras' allotment must not only be Bumiputras but must also be government servants who are members of Cuepacs. DW1 challenges the plaintiff's status by alleging that the plaintiff had misrepresented himself as a Bumiputra and by such misrepresentation, had induced the defendant to allot him Lot No. 31. Unfortunately, apart from making the allegation, no evidence was adduced that the plaintiff had misrepresented himself as a Bumiputra. On the contrary, the plaintiff had all along held himself out to be one as can be seen from the tenor of his letter, AB13, dated 26 December 1979, and in subsequent communications with the plaintiff, the defendant had not objected to the plaintiff being disqualified from being allotted a housing lot. There is therefore no merits on the defendant's claim that the plaintiff had misrepresented himself by passing off as a Bumiputra as he had no reason to resort to such behaviour as it is clear that he is a Bumiputra.

g Oddly enough, the defendant did not take any exception to the fact that the plaintiff was not a government servant, the other necessary qualification entitling him to the housing lot. Perhaps, DW1's evidence that the directors of the defendant had discovered there had been indiscriminate allotment of housing lots to persons who did not qualify may well have something to do with this and that no action was taken against any of them.

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I consider that the only issue before me is whether there had been an offer and acceptance of the sale of a housing lot by the defendant to the plaintiff. Reading the defendant's letter of allotment, AB2, it is clear that the defendant had offered the plaintiff a housing lot at a cost price of RM139,000 and that the terms of payment and other relevant particulars are clearly spelt out in AB2. It was also pursuant to AB2 that the plaintiff made payment of the booking fee of RM2,650 and that he had, at the same time, signed an application form, similar to AB3. D.W.1 had denied receiving any application form from the plaintiff but on his own admission that the allotment of housing lots had been done quite haphazardly, in all probability, there may well have been no proper documentations maintained and moreover, subsequent correspondence from the defendant in the Agreed Bundle of Documents does not indicate the plaintiff to be anything but a potential purchaser to whom Lot No. 31 had been allotted.

It was only after the plaintiff had paid booking fee of 'RM2,650 that the defendant made the first of two variations. The first variation replaced the mode of payments of the 35% purchase price as stated in AB2 with another varied mode of payments as contained in AB9 to which the plaintiff reluctantly agreed as can be seen from AB13 by paying the balance of the booking fee on 16 January 1980. Thus as at that date, the plaintiff had complied with his part of the bargain by depositing with the defendant, the booking fee representing 10% of the purchase price pursuant to AB9 and I hold that there was valid contract between them pursuant to the terms and conditions contained in AB9. The next step after payment of the booking fee is the execution of the Sale and Purchase Agreement upon which another sum of RM13,950 became due and payable by the plaintiff. This happened sometime in September 1980 when the plaintiff called at the office of that at the defendant's solicitors in answer to AB32. There is undisputed evidence that at the solicitors' office, the plaintiff was informed that the purchase price of the housing lot had been increased to RM169,500 and that the costs of the extra land also increased to RM7 per square foot. There was no evidence to show that the plaintiff had been informed before this that the purchase price and the price of the extra land would be increased and it is clear from the evidence that the defendant unilaterally took upon itself to vary the contract and that this second variation was the only reason why the plaintiff refused to execute the Sale and Purchase Agreement. To that extent, I find that the defendant had breached the contract that had been validly entered between them pursuant to AB9.

Having held that AB9 is a validly constituted contract, can it be specifically performed to enable the plaintiff to be the owner of the two-storey bungalow which has already been completed on Lot No. 31 and which has been caveated by the plaintiff since 8 May 1981? The defendant maintains that this is not a special case for which specific performance would lie as the plaintiff had only made two payments representing 10% of the purchase price and the price of the extra land, and since he was a speculator, damages would be a more proper remedy. There is no evidence to show that the plaintiff was a speculator as evidence of his earnings alone or his financial standing at the material time cannot possibly point to him being a speculator. In this case, as I have already held that the defendant had been at fault and the contract is capable of being specifically performed, I consider that specific performance is the right and proper remedy for the plaintiff and to that end, pursuant to AB9, the Sale and Purchase Agreement is to be executed by both parties based on the original agreed price of RM139,000 and the original price of extra land at RM5 per square foot, within 1 month of this judgment and that the sum of RM13,950 is to be paid by the plaintiff on the

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- a* signing of such an agreement and in view of the fact that the house is already complete, the balance of the direct payment representing 35% of the purchase price is to be settled by the plaintiff within 2 months of the signing of the Sale and Purchase Agreement. On the same consideration that the defendant had breached AB9, I cannot accede to the defendant's request that the plaintiff bear interests for late payments on the costs of constructing the house. In making this order of specific performance, I also penalize the defendant for the costs of this action.
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Also found at [1986] 1 CLJ 67

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